

- VOLUME D -

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF DELAWARE

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THE JOHNS HOPKINS UNIVERSITY, : CIVIL ACTION
A Maryland Corporation, :
BAXTER HEALTHCARE CORPORATION, :
A Delaware Corporation, :
and BECTON DICKINSON AND :
COMPANY, A New Jersey :
Corporation, :

Plaintiffs

v.

CELLPRO, A Delaware
Corporation,

Defendant

NO. 94-105 (RRM)

- - -

Wilmington, Delaware
Friday, March 7, 1997
10:00 o'clock, a.m.

- - -

BEFORE: RODERICK R. McKELVIE, U.S.D.C.J.

- - -

APPEARANCES:

POTTER, ANDERSON & CORROON
BY: WILLIAM J. MARSDEN, JR., ESQ.

Counsel for Plaintiffs

Official Court Reporters

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BY MR. WARE:

Q. Okay. I think you have it.

And, Mr. Murdock, you had testified in your direct examination that CellPro had no need for the '680 patent because it had no need for a product that provided purity of greater than 90 percent.

Do you recall that testimony?

A. Yes, I do.

Q. And, Mr. Murdock, do you see the reference in the specification for the product for the desired specification as greater than 90 percent? Desired stem cell purity is greater than 90 percent?

A. Yes, I see that.

Q. Thank you.

A. I might add that the data speaks for itself. In our phase three clinical trial, our purity was 40 percent.

MR. WARE: Your Honor, may that be stricken, please, as nonresponsive?

THE COURT: I'm not going to strike it. You can follow up on it, if you want to.

MR. WARE: Okay.

THE COURT: (Addressing the jury) This is not going to be a matter you're being asked to decide

1 Q. And, Mr. Murdock, when you testified earlier about
2 the SC product, you mentioned that the antibody is
3 injected into the bag up at the top; is that right?

4 A. That's correct. Not the bag by itself, but the
5 bag with either bone marrow or peripheral blood in it.

6 Q. Right. Okay.

7 And then, when the system operates, the bone
8 marrow or blood flows through the product and then in
9 this bag at the bottom is purified stem cells; is that
10 correct?

11 A. That's correct.

12 Q. Okay.

13 And I see that here we have a vial, which I
14 take it ordinarily contains the antibody; is that right?

15 A. That's correct.

16 Q. Okay.

17 And, Mr. Murdock, I note that this vial that
18 you brought for the demonstration is empty; is that
19 right?

20 A. Yes.

21 Q. Mr. Murdock, if you had nothing but empty vials
22 of antibody, this machine wouldn't work, would it?

23 A. Well, see, the key to this is that we can use
24 any antibody and this system is very valuable.

25 Q. Okay.

1 A. We use it for other types of lymphocyte
2 separations. That's why we use an empty vial, because
3 it could be any antibody. The system itself has a lot
4 of value for processing all kinds of cells for cell
5 therapy.

6 Q. I didn't mean to be misleading. Let me correct
7 that.

8 In terms of the product that we call the stem
9 cell concentrator, whose purpose is to concentrate stem
10 cells in the bag, you've got to have CD34 antibody in
11 this vial to make it work; is that right?

12 A. That is correct. And I would also add that that
13 vial alone will not get you purified stem cells. Without
14 our avidin/biotin technology, you also do not have stem
15 cells to treat patients.

16 Q. Right.

17 And it's fair to say that without the
18 antibody, you don't have stem cells either; is that
19 correct?

20 A. And without the system you have no stem cells
21 either.

22 Q. So you need both?

23 A. You need both.

24 MR. WARE: I have no further questions,
25 your Honor.

1 Q. And Exhibit No. 1164 is in January of 1992, isn't
2 it?

3 A. That's correct.

4 Q. Could you turn to Exhibit No. 709?

5 A. I have it.

6 Q. What was CellPro's understanding as to the purpose
7 of this letter?

8 MR. WARE: Objection. That goes to
9 Baxter's purpose, I guess.

10 BY MR. BLOOMBERG:

11 Q. CellPro received this letter from Baxter?

12 A. Correct?

13 THE COURT: Overruled.

14 BY MR. BLOOMBERG:

15 Q. And what did CellPro understand from this letter
16 Baxter was trying to do?

17 A. It was a very clear message to us that in order to
18 give us rights to the Civin patents, Baxter was demanding
19 that we give them exclusive rights to our product, to
20 distribute our product.

21 Q. If we can go back to the calculation of the
22 antibody portion of the system versus the rest of the
23 system. When you made the offer to Baxter, had CellPro
24 done that calculation, to see what it was?

25 A. I believe that we did, actually. And I believe

1 that the number that we came up with at the time was
2 20 percent, or in the range of 20 percent.

3 Q. Would you turn to Exhibit No. 637?

4 A. I have it.

5 Q. Again, this is a letter that CellPro received
6 from Baxter?

7 A. Yes.

8 Q. What did CellPro understand to be the purpose of
9 this letter?

10 A. Well, in the first letter that they sent us, which
11 was the one in which they told us the only way they'd
12 give us a license was if we gave them exclusive rights.
13 That was obviously the basis for all of our antitrust
14 claims. This letter was clearly contradictory to the
15 other letter.

16 And we considered this to be a purge letter,
17 basically to undo all of what had been said in the other
18 letter or to try to undo that, since we had filed suit.

19 MR. BLOOMBERG: No further questions, your
20 Honor.

21 THE COURT: All right. You may step down.

22 MR. WARE: May I have a couple of recross or
23 not?

24 THE COURT: No.

25 (Witness excused)

- VOLUME E -

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A Maryland Corporation, :
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Corporation, :

Plaintiffs :

v. :

CELLPRO, A Delaware :
Corporation, :

Defendant :

NO. 94-105 (RRM)

- - -

Wilmington, Delaware
Monday, March 10, 1997
9:00 o'clock, a.m.

- - -

BEFORE: RODERICK R. MCKELVIE, U.S.D.C.J.

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APPEARANCES:

POTTER, ANDERSON & CORROON
BY: WILLIAM J. MARSDEN, JR., ESQ.

Counsel for Plaintiffs

Official Court Reporters

1 remember submitting a declaration to that Court?

2 A. I do.

3 Q. That declaration was under oath?

4 A. Yes.

5 MR. WARE: May I approach the witness, your
6 Honor?

7 MR. WEISS: Objection, your Honor. Outside
8 the scope of direct.

9 THE COURT: I don't know where he is going
10 yet. I don't know whether it is or not. Let's see.

11 BY MR. WARE:

12 Q. I have in here at Tab 94 a copy of that declaration,
13 Mr. Kiley.

14 Do you recall that you attached to that
15 declaration some notes that were prepared by Dr. Porter
16 in I believe it is August of 1991? That would be Exhibit
17 E to your declaration?

18 A. I have the notes.

19 Q. And those notes were made by the then President of
20 CellPro; is that correct?

21 A. Yes.

22 Q. And those notes were made in preparation for a
23 meeting he was planning to have with representatives
24 of Baxter; is that right?

25 A. That would appear from the title, yes.

1 Q. Is it not correct, Mr. Kiley, that in preparing
2 for that meeting, Dr. Porter made the note that CellPro
3 was, quote:

4 "Looking to gain European marketing
5 partner (exclusive distribution rights)"?

6 A. Yes.

7 Q. In your direct examination, Mr. Kiley -- I can take
8 that back, please.

9 In your direct examination, Mr. Kiley, you
10 indicated, -- strike that.

11 In your direct examination, Mr. Weiss sought
12 to elicit testimony from you that it was not until 1994
13 that CellPro had any notice from Baxter that Baxter
14 contended that CellPro was infringing the patents; isn't
15 that correct? Do you recall when Mr. Weiss asked you
16 those questions?

17 A. I do recall the questions.

18 Q. And Mr. Kiley, isn't it a fact that in your 1992
19 declaration -- strike that. Let me back up.

20 Your declaration -- I better give it back to
21 you. Your declaration was signed in December 1992; is
22 that correct?

23 A. Yes.

24 Q. And could you turn to Paragraph 5 of that
25 declaration?

1 Q. And that is going to make it more difficult for
2 Baxter, when Baxter comes into the market, isn't it?

3 A. I think it might. On the other hand, if we prove
4 that stem cell selection is a benefit to cancer patients,
5 then it is going to create a market. And it is often
6 true that a follower strategy is the best one.

7 Q. When Baxter does come into the market, it is going
8 to be faced with price competition from CellPro; right?

9 A. Well, they are in the market and the price
10 competition is coming from Baxter, who is selling
11 its products more cheaply.

12 Q. That may be because they are coming from behind;
13 right, Mr. Kiley?

14 A. I don't know why they are doing that.

15 Q. And you don't know enough about the products to
16 even compare the features; right?

17 A. I wouldn't hold myself out as an expert in stem
18 cell selection, no. I do know something about the
19 Baxter product and its configuration.

20 Q. In a market where there is only one competitor,
21 there isn't the potential for price competition, is
22 there?

23 A. If there is one competitor, then there are two
24 parties in the market.

25 Q. All right. You misunderstood my question or I

1 offer and then stick to our guns.

2 Q. Then why did Mr. Murdock in this courtroom testify
3 twice that was CellPro's first offer?

4 A. Because I think that Mr. Murdock didn't realize that
5 I was going to accompany him to the negotiation and see
6 that it was our last offer, if that was what was necessary
7 to allow us a decent profit. That is why Directors are
8 put over CEO's.

9 Q. And what you are doing here, Mr. Kiley, is really,
10 you are trying to negotiate with the jury. Isn't that a
11 fact?

12 MR. WEISS: Objection, your Honor.

13 THE WITNESS: I think in a sense we both
14 are.

15 THE COURT: Overruled.

16 THE WITNESS: Life is negotiation.

17 BY MR. WEISS:

18 Q. You are putting in a low end proposal; right?

19 A. I suppose Mr. Hausman would call it a conservative
20 proposal. He is putting in a high-end proposal, isn't he?
21 I could take ten, but I will be conservative and take
22 eight. I could take \$3 million, but I will be
23 conservative and ask for 750,000. Aren't we both doing
24 the same thing?

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